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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-90

JAMES E. SKELTON,
Appellant,

v.

CITY OF BIRMINGHAM,
Appellee.

Appeal from the Alabama Court of Criminal Appeals

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16, Appellee moves the Court to dismiss the Appeal herein or, in the alternative, to affirm the judgment of the Alabama Court of Criminal Appeals on the ground that the Appeal presents no substantial federal question.

OPINION OF THE COURT BELOW

The opinion of the Alabama Court of Appeals is reported at 368 So.2d 877, and is set forth in the appendix to appellant's brief at appendix page A-1.

MOTION TO DISMISS OR AFFIRM

This Case Presents No Substantial Federal Question Warranting Review by This Court

Appellant has not been denied due process of law by his conviction for violation of the Birmingham trespass ordinance. The Alabama Court of Criminal Appeals properly followed the ruling of the Alabama Supreme Court in the case of *Clemons v. City of Birmingham*, 277 Ala. 447, 171 So.2d 456 (1965) that the Birmingham trespass ordinance was valid on its face. The ordinance did not reach into constitutionally protected areas of freedom of expression and gave fair warning to all of the conduct prohibited by the ordinance. The Alabama Court of Criminal Appeals properly affirmed the trial court's findings as to the weight and sufficiency of the evidence presented to support the conviction. There is clearly no substantial federal question raised for review.

QUESTIONS PRESENTED

Appellant in his Statement before this Court has raised for the first time the issue that the Birmingham trespass ordinance is unconstitutionally overbroad in that it purports to sanction "other individual liberties and freedoms protected by the United States Constitution." Appellee maintains that since this issue has never been raised before at any trial or appellate level that such issue is not now properly before this Court.

1. Whether the Alabama Court of Criminal Appeals properly found that the Birmingham ordinance was not unconstitutionally overbroad on its face in violation of the First and Fourteenth Amendments to the United States Constitution.

2. Whether the Alabama Court of Criminal Appeals properly found that the Birmingham ordinance was not unconstitutionally vague and indefinite in violation of the Fourteenth Amendment to the United States Constitution.

3. Whether Appellant's conviction was unconstitutionally based on a record lacking evidence as to any crucial element of the offense for which he was charged in violation of the Fourteenth Amendment to the United States Constitution.

STATEMENT

On November 8, 1977, Appellant was in the downtown office of Birmingham Trust National Bank (hereinafter referred to as BTNB) for the purpose of negotiating government checks. While in BTNB, Appellant yelled out, "I don't like for a God-damned nigger to be starring at me!" This comment was directed to Reaf Blue, a black bank security guard employed by BTNB. Appellant was warned by two other BTNB guards to watch his language and to refrain from using profanity in the presence of bank employees and customers. After each warning, Appellant would again yell out this same statement. After the third outburst, BTNB security guards allowed Appellant to complete his banking business and escorted him from the bank. The Birmingham Police Department was notified and their assistance was requested.

Upon the arrival of Birmingham police officer, Jan Snider, Rufus Allen [a senior vice-president of BTNB] came outside and spoke with the Appellant in the presence of the officer. Mr. Allen told Appellant:

> ". . . I did not appreciate the abusive language that he had used in the presence of my employees and my customers and that I was closing his account so he would not

have any reason for ever coming back in the bank and I didn't want him to come back in the bank."

Officer Snider asked Appellant if he understood the warning given by Mr. Allen and repeated it to Appellant. Officer Snider told Appellant he was free to go, but not to go back into the bank; that if he did go back into the bank, he would be arrested for trespass after warning. Appellant replied that he would "have to call your bluff," and proceeded back into the bank. At this time Appellant was placed under arrest for trespass after warning.

Birmingham Trust National Bank is a national bank organized in 1887. It has occupied and operated a banking business in this downtown location since October 26, 1923.

ARGUMENT

1

Appellant Was Not Deprived of Due Process of Law Under the Fourteenth Amendment in His Trial and Conviction for Violation of the Birmingham Trespass Ordinance.

I

Overbreadth

Appellant maintains that the language of the Birmingham criminal trespass ordinance, when viewed on its face, is so broad in scope that it purports to sanction conduct protected under the Constitution, specifically First Amendment freedoms. It is not claimed that the ordinance has been unconstitutionally applied to Appellant in its enforcement. He asserts that enforcement of the ordinance, because of its alleged overbreadth, could infringe on the rights of free speech, press, assembly. . . . These rights are protected from invasion by the First Amendment; the Fourteenth Amendment extends the protection by applying the First Amendment to invasion of these freedoms by the State. However, the Fourteenth Amendment has never been thought to control purely private action. Neither is mere enforcement by the State of charges brought by a private concern "state action" under the Fourteenth Amendment. This Court in *Gober v. City of Birmingham*, 373 U.S. 250, 83 S.Ct. 1133 (1963) stated:

> ". . . the Court does not question the long-established rule that the 14th amendment reaches *only state action*. Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835. And it does not suggest that such action, denying equal protection, may be found in the *mere enforcement* of trespass laws in relation to private business establishments from

which the management . . . has chosen to exclude persons . . ." 83 S.Ct. at 1133 (emphasis added)

The fact that a private concern has extended a general invitation to the public to patronize its business does not cause it to "lose its private character" and thus become subject to Fourteenth Amendment restrictions. *Lloyd Corp. Ltd. v. Tanner*, 407 U.S. 551, 92 S.Ct. 2219, 2229, 33 L.Ed.2d 131 (1972). "An individual's right to restrict the use of his property however unregenerate a particular exercise of that right may be thought, lies beyond the reach of the Fourteenth Amendment." *Gober v. City of Birmingham, supra*, 83 S.Ct. at 1135. *Lloyd Corp. Ltd. v. Tanner, supra*. To deny private businesses the right to nondiscriminatorily limit the use of their premises as they see fit would be to deprive them of property "without due process of law" for "public use without just compensation." U.S. Const. amends. V and XIV.

Appellant contends that because the trespass ordinance may at times be applied to unlawful entry on *public* lands, there would be sufficient "state action" to invoke the Fourteenth Amendment on *all* enforcement of the ordinance. In insuring protection of First Amendment freedoms it must be remembered that they are not in themselves a touchstone; "the Constitution is not unmindful of other important interests, such as public order . . ." *Niemotko v. State of Maryland*, 340 U.S. 268, 284, 71 S.Ct. 328, 333 (1951). This Court recognized that "legislatures, local authorities and the courts have for years grappled with the claims of the right to disseminate ideas in public places as against claims of an effective power in government to keep the peace and to protect other interests of a civilized community." *Id.* at 274, 275. This Court established a standard for weighing First Amendment freedoms against the need for public order in *Cox v. Louisiana*, 379 U.S. 536, 554, 85 S.Ct. 453, 464, 13 L.Ed.2d 471 (1965).

"The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy."

First Amendment freedoms have been jealously guarded by the Courts, but those rights of expression are not absolute at all times, all places and all circumstances. The exercise of such freedoms is concommittant with the responsibility not to abuse that liberty. Ala. Const.Art 1 § 4; *Lloyd Corp. Ltd. v. Tanner, supra*; *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). Intemperate, intentional offensiveness and personally abusive epithets, as were expressed by Appellant, are "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire, supra*, 315 U.S. at 571; *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971).

In balancing First Amendment freedoms against the need to preserve public order, there are different degrees of protection afforded the right of free expression. This depends upon the nature of a place, its primary use, the pattern of its activities and the compatibility of the manner of expression with the place. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974). In areas such as public streets and parks, freedom of expression is highly protected from government interference; these are areas which "have immemorially been held in trust for the use of the public. . . . for the purposes of assembly, communicating thoughts between citizens and discussing public questions." *Grayned v. City of*

Rockford, 408 U.S. 104, 92 S.Ct. 2294, 2302, 33 L.Ed.2d 222 (1972). In facilities such as libraries and schools, the government has the power to limit freedom of expression to maintain the order required to carry on the purpose of those institutions. *Brown v. Louisiana*, 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966); *Grayned v. City of Rockford, supra; United States v. Douglass*, 579 F.2d 545 (9th Cir. 1978). Public institutions which perform no speech related functions at all may regulate freedom of expression to exclude that which interferes with their functioning. *Adderly v. Florida*, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966); *United States v. Douglass, supra.*

This Court in *Adderly v. Florida, supra*, ruled on the challenge of overbreadth to a trespass statute similar to the Birmingham ordinance. The Court ruled that there is:

> "Nothing in the Constitution of the United States [to prevent] Florida from even-handed enforcement of its general trespass statute . . . The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfulfily dedicated. . . . The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose." 87 S.Ct. at 247.

The Alabama Court of Appeals properly found that the Birmingham trespass ordinance was not so broad on its face that it would sanction conduct protected by the United States Constitution.

II

Vagueness

Appellant contends that the Birmingham trespass ordinance is unconstitutionally vague and in violation of the Fourteenth

Amendment to the United States Constitution. The accepted test for determining the required precision of statutory language imposing criminal liability is whether the language conveys a sufficiently definite warning as to the prescribed conduct when measured by common understanding and practice that a person of ordinary intelligence would be given fair notice that such conduct is forbidden by Statute and to mark boundaries sufficiently distinct for judge and juries to fairly administer the law. *United States v. Harriss*, 347 U.S. 612, 74 S.Ct. 808 (1954); *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957); *Jordan v. DeGeorge*, 341 U.S. 223, 71 S.Ct. 703 (1951); *Connally v. General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126 (1926). In applying this test, difficulty in determining whether certain marginal offenses come within the meaning of the language does not automatically render a statute vague for indefiniteness. *Jordan v. DeGeorge, supra*; *Roth v. United States, supra*; *United States v. National Dairy Products Corp.*, 372 U.S. 29, 83 S.Ct. 594 (1962).

> "The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited. . . ." *Colten v. Commonwealth of Kentucky*, 407 U.S. 104, 92 S.Ct. 1953 (1971).

The test for vagueness does not require impossible or impractical standards of specificity; "there are limitations in the English language with respect to being both specific and manageably brief." *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 2913-4, 37 L.Ed.2d 830 (1973). Condemned to the use of words, which inevitably contain germs of uncertainty, there can be no mathematical precision in drawing statutes.

In applying the test of vagueness to a statute or in determining overbreadth, it must be remembered that a fundamental rule of statutory construction is that the Court, if fairly possible, must construe statutes as to avoid a danger of unconstitutionality. *United States v. National Dairy Products, supra; United States v. Harriss, supra.*

The constitutional challenge was raised in the case of *Clemons v. City of Birmingham*, 277 Ala. 447, 171 So.2d 456 (1965), alleging that the Birmingham trespass ordinance was vague and overbroad in violation of the Fourteenth Amendment to the United States Constitution. The Supreme Court of Alabama ruled that the Birmingham ordinance clearly specified the type of conduct made a criminal offense under its provisions and that the ordinance was not unconstitutionally vague and thus was not invalid.

A majority of states have enacted the same or similar trespass statutes. This legislative right has traditionally been considered a valid exercise of the State to preserve property rights. Tradition holds that "American law punishes persons who enter onto the property of another after having been warned to keep off." *Martin v. City of Struthers*, 319 U.S. 141, 63 S.Ct. 862, 865 (1943). This Court in the cases of *Adderly v. State of Florida, supra*, and *Bouie v. City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697 (1964) held that the Florida and South Carolina trespass statutes were not void for vagueness on their face; the language of the statute was "admirably narrow and precise" 84 S.Ct. at 1701 and held "nothing to entrap or fool the unwary." 87 S.Ct. at 244.

The Alabama Court of Criminal Appeals properly ruled that the language of the Birmingham trespass ordinance was ". . . clear and precise. It states exactly what conduct is unlawful and provides for a warning to be given. A person of common intelligence would not have to guess at the meaning of the ordinance."

Appellant's Jurisdictional Statement, A-4. The Birmingham ordinance is not unconstitutionally vague or indefinite on its face.

2

All elements of the Birmingham trespass ordinance were presented in evidence and were sufficient to sustain the conviction

Appellant maintains that there was a complete absence of the introduction of evidence as to one or more of the elements of the offense for which he was charged. The elements of the offense of trespass after warning are as follows:

(1) to go upon the lands, buildings or premises of another;

(2) after having been warned not to do so; and

(3) by the owner, lessee, custodian or other person in possession thereof, his agent or representative.

There exists in the trial record substantial evidence of all three elements.

(1) Possession of the premises resided in Birmingham Trust National Bank and has since October 26, 1923 (R. 47). "Possession is a collective fact to which a witness may testify." *Lawson v. Garrett*, 286 Ala. 125, 237 So.2d 648 (1970). Each witness testified that the property was in the possession of BTNB and there was no testimony presented that possession resided in any other.

(2) Appellant would argue the semantics of the word "warning," alleging that no warning was given, only an expressed preference. In looking to the record, Mr. Allen, a senior vice-president of BTNB told Appellant that he would have no reason ever to come back in the bank and that he (Mr. Allen) did not want him to come back in the bank. (R.44) Following

this statement, Officer Snider, in the presence of Mr. Allen, told Appellant not to go back in the bank again. Officer Snider explained to Appellant that he had been warned to stay out and that if he did go back into the bank, he would be arrested for trespass after warning. (R. 70). Appellant replied to Officer Snider that he would "have to call your bluff." (R. 33, 45, 70). This statement by Appellant strongly implies that he recognized the warning and intentionally chose to disregard the warning.

(3) The third element is that the warning be given by the owner, lessee, custodian, possessor or the agent or representative thereof. Mr. Allen, a ranking officer of BTNB, was recognized to be the person in charge of this location of the bank. (R. 16, 40). By virtue of these positions, Mr. Allen was acting as agent or representative of BTNB, the possessor of the premises.

Each of the elements of the offense was supported by substantial, admissible, unrebutted evidence which was sufficient to prove the offense charged.

CONCLUSION

For the foregoing reason Appellee respectfully submits that the Birmingham trespass ordinance presents no question whatever in conflict with the First and Fourteenth Amendments to the Constitution of the United States, or the decisions of this Court. Accordingly, Appellee moves the Court to dismiss this Appeal or, in the alternative, to affirm the unanimous judgment entered in the cause by the Alabama Court of Criminal Appeals.

Respectfully submitted,

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